



STATE OF INDIANA

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December 17, 2008

Thomas Mason
4800 South 930 East
Wolcottville, Indiana 46975

Re: Formal Complaint 08-FC-240; Alleged Violation of the Access to Public Records Act by the LaGrange County Planning and Zoning Department

Dear Mr. Mason:

This advisory opinion is in response to your formal complaints alleging LaGrange County Planning and Zoning Department ("County") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the County's response to the complaints is enclosed. In my opinion the County has not provided sufficient evidence to bear the burden of proof to sustain the denial of access to the entirety of the records.

BACKGROUND

You filed the present complaint on November 18, 2008. You allege that on October 20 and 29 you requested access to copy the record of public nuisance complaints for the years 2007 and 2008. You received letters dated October 24 and November 5 from attorney Kurt Bachman wherein your request was denied. The County claims the record you have requested is a diary or journal subject to disclosure at the discretion of the County, pursuant to I.C. § 5-14-3-4(b)(7).

The County responded to the complaint by letter dated December 3 from Mr. Bachman. Invoking the diaries and journals exception, the County cites the Indiana Court of Appeals decision in *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998). The County contends the materials you requested consist of a personal and ongoing log or journal that LaGrange County Enforcement Officer Carol Marbach maintains. The records concern information provided to Ms. Marbach on activities related to nuisance enforcement. Ms. Marbach lists in the record her observations and thoughts regarding nuisance enforcement actions. The County contends the entries are for her personal use in keeping track of her activities and associated rules for enforcement and include notes regarding nuisance compliance requirements. The County contends no one else makes entries into the log and she only shares it with select others on occasion.

Further, the County contends that it has not waived discretion regarding the materials. While you argue that you have received the same document for the year 2000, the County contends the 2007 and 2008 records are different – they were prepared by a different person, containing different information, prepared in a different format, containing the personal notes of the creator. Finally, the County contends it does not have a duty to redact the personal notes or entries from the records.

ANALYSIS

The public policy of the APRA states, "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. The County is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the County during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

You have requested records containing nuisance complaint information for 2007 and 2008. The County contends the records, created by Ms. Marbach, comprise a personal log or diary.

The APRA provides a discretionary exception to disclosure for "[d]iaries, journals, or other personal notes serving as the functional equivalent of a diary or journal." I.C. § 5-14-3-4(b)(7). The Indiana Court of Appeals addressed this exception to disclosure in *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998). The issue centered on an NCAA compliance log maintained by a University employee. The log was described as "notes that [the employee] has made concerning information provided to him on activities related to NCAA or Big Ten rules and regulations." *Id.* at 829. The log was ongoing, it was a place for his personal notes, and no one else made entries in the log. The employee specifically referred to it as his notebook or diary and shared it with select others only on occasion. The court held that the log "clearly falls under the diary, journal, or personal notes exception to the Act. *Id.*

While the County asserts the records at issue are similar to those in *Journal Gazette*, the present matter can be distinguished from that case. In *Journal Gazette*, there is no evidence the compliance log at issue was the only record pertaining to a specific function required to be carried out by a public agency. Here, it is my understanding the materials at issue may be the only public records of the nuisance complaints. Further, one duty of the County, as described in Ms. Marbach's job description, is to "[a]ccept and find nuisance complaints in accordance with the nuisance ordinance." If the County can rely on the diaries and journals exception on the basis that the record contains personal notes, the public is shut out from access to any information about nuisance complaints. In my opinion, this defeats the intent of the APRA as stated in I.C. § 5-14-3-1.

While I agree that Ms. Marbach's personal notes serving as the functional equivalent of a diary or journal contained in the materials may be nondisclosable at the discretion of the agency, I cannot agree that the entire record is thereby rendered nondisclosable. The APRA provides that when a record contains disclosable and non-disclosable information, the disclosable should be separated, and access should be provided to that portion of the record. I.C. § 5-14-3-6. The County argues that this office has previously interpreted I.C. § 5-14-3-4(b)(7) to apply to the entire record that meets the exemption. In support, the County cites *Opinions of the Public Access Counselor 01-FC-42 and 05-FC-152* (which cites the former).

In both of those opinions, the record at issue was a calendar maintained as a personal journal or diary. In *Opinion 01-FC-42*, Counselor O'Connor opined that "Indiana Code section 5-14-3-7 does provide that so long as the entire calendar functions as a diary or journal, then that calendar may be subject to nondisclosure as a whole." *Id.* I agree with Counselor O'Connor's opinion as applied to a record like a calendar, wherein all of the information falls under the exception. Here, though, it is my understanding the document at issue is a listing of nuisance complaints with Ms. Marbach's notes in one or more of the fields. In that case, it is my opinion the portion serving as a diary or journal could be redacted and the portion serving as the County's record of nuisance complaints filed should be made available.

Ultimately, the County bears the burden of proof to sustain the denial of access. In my opinion and based on the information I have regarding the records, the County has not done so as it relates to the entirety of the records at issue. While an *in camera* review may better illuminate the issue, my office does not have the same statutory authority as a court to review documents *in camera*.

CONCLUSION

For the foregoing reasons, it is my opinion the County has not provided sufficient evidence to bear the burden of proof to sustain the denial of access to the entirety of the records.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Kurt Bachman, Beers Mallers Backs & Salin LLP
Chris Godlewski, LaGrange County